88-1092

Supreme Court, U.S.
FILED
DEC 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MARYLAND CASUALTY COMPANY,
a foreign corporation
Petitioner,

v.

RICARDO LOZANO,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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70pp

QUESTIONS PRESENTED

The Eleventh Circuit's decision below expressly addressed whether arbitrators are to be held to the same standard as judges; in that a neutral arbitrator must be unbiased, but also must avoid even the appearance of bias and thus must disclose to the parties any dealings that might create an impression of bias. The Eleventh Circuit, contrary to decisions of this Court, refused to apply the per se rule of vacatur, as set out in Common Wealth Coatings v. Continental, infra; in a situation in which the neutral arbitrator had business investments with the Plaintiff's arbitrator and interlocking business investments with the Plaintiff's attorney, but failed to disclose this and an extremely high arbitration award of $850,000 was entered. In view of the policy of the courts to encourage arbitration to settle disputes, to relieve

the clogging of the judicial systems throughout the United States, the Eleventh Circuit's decision and the resulting rule of law are contrary to that policy and serve to defeat that policy; since all types of businesses throughout the United States will be very reluctant to use arbitration; if the neutral arbitrator can be biased by business dealings; while the standard of impartiality available in the judicial system is much higher. The questions presented are:

1. Under this Court's decision in Common Wealth Coatings, infra, does the per se rule of vacatur apply to neutral arbitrators to impose an affirmative duty to disclose any dealings which might create an impression of possible bias?

2. Under this Court's decision in Liljeberg v. Health Services Acquisition Corp., infra, should 28 U.S.C.Section 455(a) be applied with equal force to arbitrators; requiring an arbitrator to disclose or disqualify himself in any proceeding in which his impartiality might

be reasonably questioned?

3. Whether this Court should resolve the direct and express conflict existing between the Eleventh Circuit's decision and the decisions of this Court and other district courts; especially in light of the heavy burden being placed on judicial systems throughout the United States today and the increasing trend and importance of arbitration, as a method of relieving the burden placed upon the courts throughout the country?

4. Whether the Eleventh Circuit departed from this Court's decision in Common Wealth Coatings, infra, when it failed to apply the same standard to the neutral arbitrator, as the the standard used in reviewing the disqualification of judges; where the Eleventh Circuit held that interlocking business relationships between the neutral arbitrator, the Plaintiff's arbitrator and the Plaintiff's attorney do not have to be disclosed, since these interlocking business relationships were not between the neutral arbitrator and a party?

LIST OF PARTIES

All the parties in the United States Court of Appeals for the Eleventh Circuit are listed in the caption.

CORPORATE PARTY'S AFFILIATIONS

Maryland Casualty Company is wholly owned by American General Corporation. Maryland Casualty Company has nine wholly owned subsidiaries. Maryland Casualty Company's affiliations are: American Insurance Association, American Nuclear Insurers, Associated Commercial Property Insurers, Industrial Risk Insurers, Insurance Services Office, National Council on Compensation Insurance, Surety Association of American, United States Aircraft Insurance Group.

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OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, infra, pgs. 1-14) in not yet reported. The opinion of the District Court, affirming the arbitration award, is set forth in the Appendix, pgs. 15-27; it was not reported.

JURISDICTION

The Judgment of the District Court (Appendix pgs. 15-27) was entered on January 5, 1986. The Judgment of the Court of Appeals, affirming the District Court's Order, was entered on August 1, 1988 (Appendix pgs. 1-14). A Suggestion of Rehearing En Banc, timely filed, was denied on November 9, 1988 (Appendix pgs. 28-29). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES

The statutory provisions involved are:

28 U.S.C. Section 455(a) and 28 U.S.C. Section 455(b)(4), which provide as follows:

> Section 455. Disqualification of justice, judge, or magistrate
>
> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questions.
>
> (b) He shall alkso disqualify himself in the following circumstances...
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

STATEMENT OF THE CASE

Lozano was a passenger in an automobile which struck a tree, injuring Lozano and resulting in Lozano's uninsured motorist claim, under his policy with Maryland Casualty Company. Under the policy, each party named an arbitrator

and those two were to select a third neutral arbitrator. The policy provided that a decision agreed to by two of the arbitrators would be binding. Lozano's arbitrator nominated three attorneys to serve as neutral arbitrator. Subsequently, three persons were nominated by Maryland's arbitrator and from that list, Lozano's arbitrator accepted Gene Kubicki; as the neutral arbitrator provided that he or his firm did not presently represent Maryland Casualty Company and not was presently planning on representing that company.

Mr. Kubicki accepted the appointment as neutral arbitrator without disclosing his participation in an interlocking investment scheme involving Lozano's attorney and Lozano's arbitrator. During the course of the arbitration proceedings, the Plaintiff's arbitrator and Kubicki, the neutral arbitrator, privately

discussed their common business interest. After a five-day arbitration proceeding, the Panel issued an award to Lozano of $850,000 dollars.

A written demand was made for disclosure by the three arbitrators; which disclosure verified the interlocking business investments between the neutral arbitrator, the Plaintiff's attorney and the Plaintiff's arbitrator. Lozano filed a District Court action to confirm the arbitration award. The District Court found no evidence of partiality or improper conduct and affirmed the award (A 15-27). Maryland appealed on the basis that even the "appearance of impropriety" was sufficient to set aside the arbitration award, relying on the Supreme Court's decision in Commonwealth Coatings, infra, and the Eleventh Circuit's decision in Middlesex, infra. Maryland asserted that the instant case

illustrated the need for the rule requiring an avoidance of even an appearance of bias, which standard is applied to Article III Judges and was advocated in Commonwealth.

At Oral Argument the parties agreed that arbitrators exercised judicial functions, they are in fact judicial officers, and rules applying to judges should apply to arbitrators. Maryland Casualty responded to an inquiry of the Eleventh Circuit as to the applicability of Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir.,) cert. denied, 449 U.S. 20, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980); asserting that the requirements imposed upon a judge under 28 U.S.C. Section 455(a);(b)(4) should be applied with equal force to arbitrators due to the similar obligations of a neutral arbitrator; especially as the goal of both judicial and quasi-judicial pro-

ceeding should be to avoid even an "appearance of partiality". Maryland asserted that under the per se rule of the Supreme Court in Commonwealth Coatings, or the reasonable person test relied on in Potashnick, Maryland's right to a fair and impartial arbitration was violated by the actions of the neutral arbitrator. Maryland then supplemented the Record with the latest Supreme Court decision addressing 28 U.S.C. Section 455(a); Liljeberg v. Health Service Acquisition Corp., 108 S.Ct. 2194, (1988) and the Eleventh Circuit's decision in United States v. State of Alabama, 828 F.2d 1538 (11th Cir. 1987). The Supreme Court's decision in Commonwealth Coatings and the Eleventh Circuit's decision in Middlesex, both stated that "a panel of arbitrators 'not only must be unbiased but also must avoid even the appearance of bias' and thus must 'disclose to the

parties' any dealings that might create an impression of possible bias", Middlesex, 1200, citing, Commonwealth Coatings at 149. While the Court of Appeals was concerned with the correct standard for arbitrators and sua sponte raised the application of a judicial standard as outlined in Potashnick, the Court refused to apply either the judicial or the Commonwealth standard to the neutral arbitrator (A 1-14). Therefore, the Opinion below was in direct and express conflict with the cases cited. A Suggestion of Rehearing En Banc was denied on November 9, 1988 (A 28-29). Maryland Casualty moved for a Stay of the Mandate, which was granted on November 18, 1988; ordering that the mandate be stayed until January 1, 1989, pending the Petition for Writ of Certiorari (A 30-31; 32-34). This Petition for Certiorari was timely filed, so that this Court can

resolve the direct and express conflict and set the appropriate standard to be applied to arbitrators.

ARGUMENT

It is respectfully submitted that the Opinion below is in direct conflict with the standard set out in the Supreme Court's decision in Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968); Liljeberg v. Health Services Acquisition Corp., 108 S.Ct. 2194 (1988) and Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982) and substantially conflicts with Morelite Construction Corp. v. New York City District Counsel Carpenters Benefit Funds, 748 F.2d 79 (2nd Cir. 1984); as these cases hold that it is appropriate to vacate an arbitration award where the neutral arbitrator has the appearance of bias, although there is no evidence of corruption, fraud

or partiality. Commonwealth, supra. In view of the policy of the courts to encourage the use of arbitration as a means of settling disputes, in order to relieve congestion in the courts across the nation, it is important for this Court to resolve the express conflict and to reaffirm the standard imposed by this Court in arbitration cases:

> [A]ny tribunal permitted by law to try cases in controversy not only must be unbias but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases in controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

Commonwealth, U.S. 149; S.Ct. 340.

Quite simply, if appellate cases such as this one are the law, which approve bias and conflict of interest by the neutral arbitrator, parties will be unwilling to use arbitration to settle disputes, and this policy of the law to

encourage arbitration will be defeated. Already in Florida many insurers have taken the arbitration clauses for uninsured motorist coverage out of their policies, and that great volume of cases have been loaded back into the litigation system. Therefore, decisions, such as the present one, defeat the policy of the law to encourage arbitration, and in fact produces a policy of the law which discourages arbitration, since all types of businesses will be very reluctant to use arbitration if the neutral arbitrator can be biased by business dealings, and the standard of impartiality of a judge is so much higher.

This Court in Commonwealth, in reviewing the evident partiality of a neutral arbitrator, stated that it had no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant,

any such relationships the judgment would be subject to challenge. Commonwealth, U.S. 148; S.Ct. 339. Justice Black, delivering the opinion of the Court, relied on the decision in Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), to apply the same standard to the neutral arbitrator, as the standard in reviewing the disqualification of judges. Commonwealth, U.S. 148; S.Ct. 339. Justice Black stated that in Tumey the Court held that a decision should be set aside, where there is "the slightest pecuniary interest on the part of the judge" and that there was no merit to the state's contention that the amount of money involved was so small that it could not be regarded as likely to improperly influence a judicial officer in the discharge of his duties. Commonwealth, 339.

Justice Black went on to state that

since the principle applied in the case was constitutional, the Court could see no basis for refusing to find the same concept in the broad statutory language that governed federal arbitration proceedings; which provided that an award could be set aside on the basis of "evident partiality". Commonwealth, U.S. 148; S.Ct. 339. While the Court recognized that arbitrators could not sever all their ties with the business world, courts should:

> [B]e even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have complete rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possbile bias.
>
> Commonwealth, U.S. 149; S.Ct. 339.

In reviewing the Supreme Court's decision in Commonwealth, the Eleventh

Circuit in Middlesex restated the principle that a panel of arbitrators must be unbiased and must also avoid even the appearance of bias; requiring them to disclose to the parties any dealings that might create an impression of possible bias. Middlesex, 1200. The Court of Appeals interpreted the Florida Supreme Court's decision in Cassara v. Wofford, 55 So.2d 102 (Fla. 1951), saying that in view of the strict morality and fairness underlying the arbitrator's duty of disclosure, Florida recognized that arbitrators are in fact judicial officers, requiring that every possible safeguard be afforded the arbitration procedure.

> The law is well settled that arbitrators exercise judicial functions; and, while not eo nomine judges, they are in fact judicial officers. "It therefore becomes of the utmost importance that in statutory proceedings of this character, where the rights of parties are adjudicated, not by

> trained lawyers and judges, but by fellow business men, every safeguard possible should be thrown about the proceeding to insure the utmost fairness and impartiality of those charged with the determination of the rights of the parties." Knickerbocker Textile Corp. v. Sheila-Lynn, Inc., 172 Misc. 1015,16 N.Y.S.2d. 435.438.

Cassara, 105; Middlesex, 1201.

The Court then recognized that Commonwealth Coatings has been interpreted to create a per se vacatur rule; requiring that the arbitration award be set aside, once it is established that the arbitrator failed to disclose potentially prejudicial facts which could impair his judgment and that only a showing of a circumstance tending to bias judgment is required to disqualify an arbitrator in Florida. Middlesex, 1201. See also, Gaines Construction Co. v. Carol City Utilities Inc., 164 So.2d 270 (Fla. 3d DCA 1964).

While the Court of Appeals below

recited these principles regarding evident partiality, as outlined in Commonwealth Coatings and Middlesex, the Opinion stated that Maryland had not met its burden to show that the possibility of bias; involving the interlocking financial scheme between the neutral arbitrator, the Plaintiff's arbitrator and the Plaintiff's counsel; was direct, evident and capable of demonstration. Lozano, 3961; (A 3). The Court then distinguished the Commonwealth Coatings and Middlesex cases, finding no evident partiality because there was no direct financial relationship between the neutral arbitrator and a party. Lozano, 3962; (A 7).

It is respectfully submitted that the proper standard to be applied to a neutral arbitrator is the per se rule set out by the Supreme Court in Commonwealth Coatings; where even the appearance of

impartiality is sufficient to set aside an arbitration award. The facts in this case, showed the interlocking financial investments between the neutral arbitrator, the Plaintiff's arbitrator and Plaintiff's counsel and created more than an appearance of impartiality, but at the very least was sufficient to meet the test applied to the disqualification of judges.

Confusion has existed since the Supreme Court's decision in Commonwealth Coatings, as a result of Justice White's concurring opinion; wherein he stated that he joined Justice Black's opinion that arbitration panels must not only be unbiased, but must avoid even the appearance of bias; but then went on to say that the Supreme Court did not decide that arbitrators were to be held to the standards of Article III Judges. Commonwealth, U.S. 150; S.Ct. 339. In Morelite,

supra, the court commented on the confusion as a result of the Supreme Court's decision in Commonwealth Coatings and found that because of the competing interest inherent in the use of arbitration, courts have adopted standards for the disqualification of arbitrators, that have been less stringent than those for federal judges. Morelite, 83; See also, Merit Insurance Co. v. Leatherby Insurance Co., 714 F.2d 673 (7th Cir. 1983).

The Second Circuit interpreted the federal arbitration standard to require a showing of something more than a mere "appearance of bias" to vacate an arbitration award and then immediately noted that in at least three District Courts, where court annexed arbitration has been established, rules have been promulgated raising the standards for arbitrators impartiality to those standards governing

Article III Judges. Morelite, 84 (Relying on U.S. District Court, District of Conn., Rule 28; U.S. District Court., Eastern District of PA., Local Rule 49; U.S. District Court, Northern District of Cal., Temporary Local Rules, Chapter V, Arbitration, Rule 500). The Second Circuit stated that if the standard of "appearance of bias" was too low for the application of Section 10 and "proof of actual bias" was too high; then in light of the competing forces existing in the arbitration system, the court held that "evident partiality ... will be found were a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration". Morelite, 84.

In other words, the Second Circuit in fact adopted the very test used to determine impartiality of Article III Judges, relied on by this Court in its

latest decision regarding judicial disqualification. Liljeberg v. Health Services Acquisition Corp., supra. The Liljeberg case was relied on by Petitioner Maryland below, as well as the decision in United States v. State of Alabama, 828 F.2d 1532 (11th Cir. 1987) and Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir. 1980). In these cases the Supreme Court, the Eleventh and Fifth Circuits all adopted the reasonable person test as the standard in reviewing disqualification of Article III Judges; which standard was applied to arbitrators by the Second Circuit in Morelite and which standard was promulgated by three U.S. District Courts. In Liljeberg, this Court found that vacatur was the proper remedy for a violation of 28 U.S.C. Section 455(a); which requires a judge to disqualify himself in any proceeding in which his

impartiality might be reasonably in question. The Supreme Court held that judicial disqualification was established when a reasonable person, knowing the relevant facts, would expect that a judge knew of circumstances creating an "appearance of impartiality". Where a judge's impartiality might be reasonably questioned, his failure to disqualify himself is a violation of Section 455(a). Liljeberg, 2202, 2203.

The application of the higher standard of "appearance of bias" or partiality serves the purpose of promoting public confidence in the integrity of the judicial system. This Court found that Congress expressly intended Section 455 to promote public confidence in the impartiality of the courts by eliminating even the "appearance of impropriety". State of Alabama, 1541. Therefore, in order for a judge to recuse himself, dis-

qualification should follow, if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality. This was the same test adopted by the Fifth Circuit in Potashnick, wherein the court noted that "an appearance of evil is often worse than the evil itself, and others get the notion that we might not administer justice in our court system". Potashnick, 1111, citing, United States v. Colombia Broadcasting System, Inc., 497 F.2d 107, 109 (5th Cir. 1974)(the protection of the integrity and dignity of the judicial system from any hint or appearance of bias is the palladium of our judicial system). The Fifth Circuit goes on to say that any question of a judge's impartiality threatens the purity of the judicial process and its institutions.

Certainly, one of the judicial institutions is the use of arbitration.

Arbitration has moved out of the context of mere contract disputes and has been touted as the wave of the future in resolving all types of matters formerly resolved only within the judicial system; such as domestic relations issues, business disputes, uninsured motorist disputes, etc. and as a method of relieving the overclogged judicial systems throughout the United States. In light of the increased importance and the use of arbitration as a means of dispute resolution, it is submitted that the Supreme Court's decision in Commonwealth Coatings has renewed importance and that the per se vacatur rule, in fact, is the correct standard to be applied to arbitrators. It is perfectly consistent with the "appearance of bias" rule applied to judges and the fact that the underlying purpose is to insure the protection of the integrity and dignity of the judicial

process, including arbitration proceedings, from any hint or appearance of bias. In Commonwealth Coatings, this Court stated that courts should be even more scrupulous to safeguard the impartiality of arbitrators than judges, and the application of the "appearance of bias" standard used in the determination of the disqualification of judges cannot be a standard too high to be imposed upon arbitrators.

The Court of Appeals below distinguished Commonwealth Coatings and Middlesex, because the evident partiality in those cases involved dealings with a party, as opposed to party's counsel. However, the Opinion pointed out that an arbitrator appointed by a party is only one step removed from the controversy, so that he need not be impartial. Lozano, 3962; (A 8). If the arbitrator is only one step removed from the controversy,

then certainly financial dealings with the arbitrator, only one step removed from the party, should meet the same requirement of disclosure of any dealings that might create an impression of possible bias. Furthermore, if the "appearance of bias" standard used for judges is applied to arbitrators, it is clear that business relationships with the parties or their counsel is sufficient to disqualify the arbitrator. In Potashnick, the judge was disqualified because he had connections with the law firm representing a party and the party's chief trial counsel; and therefore the appearance of impartiality was sufficient to require his disqualification. Under the test set out in Commonwealth and Liljeberg, the neutral arbitrator's failure to disclose financial relationships with the Plaintiff's arbitrator and Plaintiff's counsel in the present case

would meet the "appearance of partiality" test, requiring that the arbitration award be vacated.

The case below illustrates the need for the rule requiring an avoidance of even an appearance of bias on the part of arbitrators. Here, a discussion occurred between the neutral arbitrator and the Plaintiff's arbitrator regarding their mutual investments during the arbitration proceedings; based on their involvement in an interlocking financial scheme involving the neutral arbitrator, Plaintiff's arbitrator and Plaintiff's counsel. Based on the decisions of the Supreme Court in Commonwealth Coatings and Liljeberg, as well as the decisions in Middlesex and State of Alabama, arbitrators, as well as judges, must avoid any action that may reasonably tend to awaken a suspicion that his social or business relationships constitute an

element in influencing conduct. In light of the $850,000 dollar Arbitration Award, the interlocking financial scheme between the arbitrators and Plaintiff's counsel and the fact that the neutral arbitrator's law firm represented clients who were adversaries of Maryland Casualty, it cannot be said that a reasonable person, were he to know all the circumstances, would not harbor doubts about the arbitrator's impartiality; and the Arbitration Award must be vacated under this standard.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari be granted in this case, not only to resolve the direct and substantial conflict between Lozano and Commonwealth Coatings and Liljeberg, but also so this Court can address the question of exceptional importance regarding the proper standard

to be applied in determining whether evident partiality exists on the part of an arbitrator under Commonwealth Coatings and this Court's most recent decision in Liljeberg.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of December, 1988 to:

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LOZANO v. MARYLAND CAS. CO.

Ricardo LOZANO, Plaintiff-Appellee,

v.

MARYLAND CASUALTY COMPANY,
A Foreign Corporation,
Defendant-Appellant,

Nos. 87-5037, 87-5228.

United States Court of Appeals
Eleventh Circuit

August 1, 1988.

PER CURIAM:

Defendant, Maryland Casualty Company, appeals the district court's summary judgment confirming an arbitration award and awarding attorney's fees, on the following grounds: there existed evident partiality on the part of the neutral arbitrator within the meaning of Fla.Stat.Ann. Section 682.13(1)(b); material questions of fact precluded summary judgment; the district court improperly limited discovery; and the trial court should not have assessed

attorney's fees. We affirm.

The arbitration grew out of a claim by Ricardo Lozano, who received substantial injuries in an automobile accident, under the provisions of his uninsured motorist policy with Maryland Casualty Company. Under the plan of arbitration, each party named an arbitrator, and those two were to select a third, so-called "neutral" arbitrator. After plaintiff's arbitrator accepted Gene Kubicki, provided he or his firm was neither representing nor planning to represent Maryland Casualty Company. After a five-day arbitration proceeding, the panel issued an award of $850,000. This action was brought in the district court to confirm that award.

[1] Maryland Casualty argues the award should not have been confirmed on summary judgment because the neutral arbitrator, Gene Kubicki, breached a duty

to disclose certain business dealings which shows "evident partiality" on his part within the meaning of Fla.Stat.Ann. Section 682.13(1)(b). See also, Commonwealth Coating Corp. v. Continental Cas. Co., 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed. 2d 301 (1968).

An affirmative duty is imposed on arbitrators to disclose "any dealings that might create an impression of possible bias." Commonwealth Coatings, 393 U.S. at 149, 89 S.Ct. at 339. The possibility of bias must be direct, definite and capable of demonstration, and the burden of proof rests on the party challenging the award. Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197, 1201-2 (11th Cir. 1982). The type of business relationship at issue is a factor to address and where trivial, disclosure is not required. Commonwealth Coating, 393 U.S. at 150, 89 S.Ct.

at 340 (White, J., concurring). Fla. Stat.Ann. Section 682.13(1)(b), states:

> (1) Upon application of a party, the court shall vacate an award when:
>
> * * * *
>
> (b) There is evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party.

Fla.Stat.Ann. Section 682.13(1)(b).

Kubicki was an investor in two real estate limited partnerships in which Lozano's designated arbitrator was also a limited partner. The general partner of both partnerships had previously been a law partner with plaintiff's attorney and his designated arbitrator. The district court states:

> The record herein indicated that

Post [Lozano's designated arbitrator] and Kubicki had each invested in a real estate transaction which was controlled by a third party. Their only obligation was to furnish money in accordance with the terms of the limited partnership agreement. There was nothing that one could do to curry favor with the other. Except for the size of the transaction and the number of investors, this is no different than two individuals buying the same issue of corporate stock or investing in the same mutual fund. The court finds nothing in this relationship which would be the basis for a disclosure by either Post or Kubicki. Nor is the fact that William Alper was the general partner a significant fact.

Alper was once a partner with Anderson and Post but this relationship terminated some eleven years before the award. The defendant's claim to set aside the award based upon the facts appearing in this record are so attenuated that it forms no basis for relief under Fla.Stat. Section 682.13. The court has carefully examined the record in this cause to determine if there is any evidence of partiality or improper conduct and has found none.

There appear to have been seven limited partners in one limited partnership and nine in the other. There were, however, no meetings ever held among the limited partners to discuss the partnerships, which are totally unrelated to the controversy between Lozano and Maryland

Casualty. The only discussion ever to have occurred between Kubicki and Post regarding any limited partnership took place during a break in the arbitration proceedings, and concerned a letter each had recently independently received from the general partner regarding a possible sale of the realty, and what each investor thought of the idea. Post testified that prior to this conversation he did not know or had forgotten that Kubicki was also an investor in the partnership. Unlike Commonwealth Coating and Middlesex, here there was no direct financial relationship between the neutral arbitrator and a party. The district court properly found that there was nothing in these facts that required disclosure by Post or Kubicki.

Nor is there merit to Maryland Casualty's argument that the limited partnership in which both plaintiff's

designated arbitrator and counsel for plaintiff were investors requires vacation of the arbitration award on the grounds of the former's evident partiality. An arbitrator appointed by a party is a partisan only one step removed from the controversy and need not be impartial. Lee v. Marcus, 396 So.2d 208, 209 (Fla.Dist.Ct.App. 1981); Finklestein v. Smith, 326 So.2d 39, 40 (Fla.Dist.Ct. App. 1976).

[2] Kubicki's failure to disclose his law firm's representation of clients who were adversaries of Maryland Casualty in two Dade County circuit court cases does not require vacation of the award. A district court in this Circuit vacated an arbitration award on such a ground. See, Continental Ins. Co. v. Williams, ____F.Supp._____, No. 84-2646-Civ-Marcus (S.D.Fla. Sept. 16, 1986). In Williams, however, the district judge

found that the neutral arbitrator was, at the time of the subject arbitration, simultaneously representing on a contingency basis another plaintiff in an action against the insurance cmopany in an effort to uphold the judgment of $220,000 against the insurance company, and thus had a direct financial stake in the outcome of that action. At least one Florida court has rejected the same argument made to it. See Brief of Appellant at 9-18, Sentry Ins. A Mut. Co. v. Czinner, 483 So.2d 500 (Fla.Dist.Ct.App. 1986). Here, there is no evidence that Kubicki was even aware that these cases existed or that the two cases were even active at the time the arbitration proceedings took place. During oral argument it was clarified that one action, involving a cross-claim against Maryland Casualty for contribution, was settled and the cross-claim was dis-

missed, and the other involved Kubicki's office representing a third-party defendant, which was also settled. There was no breach of duty to disclose or evidence of partiality.

[3] The award was not invalid as a matter of law, just because it did not address the seatbelt defense. See, Ins. Co. of N.A. v. Pasakarnis, 451 So.2d 447 (Fla. 1984). An arbitration award may not be vacated upon a mistake of law, but only upon one of the enumerated statutory grounds. McDonald v. Hardee County School Bd., 448 So.2d 593, 594 (Fla.Dist. Ct.App.), rev. denied, 456 So.2d 1181 (1984); Newport Motel, Inc. v. Cobin Restaurant, Inc., 281 So.2d 234, 235 (Fla.Dist.Ct.App. 1973); Dairyland Ins. Co. v. Hudnall, 279 So.2d 905, 907 (Fla. Dist.Ct.App. 1973). Maryland Casualty requests this Corut to consider the arbitrator's mistake in law in failing to

answer special interrogatories regarding the seatbelt defense. This is beyond the review standard available on this appeal.

Maryland Casualty's next three arguments overlap considerably. Maryland Casualty contends that material questions of fact precluded entry of summary judgment for Lozano; that the district court improperly limited discovery requests into the identities and interests of the investors in the limited partnerships; and that the arbitration award could have been vacated on the grounds of corruption on the part of either Post or Kubicki had these discovery requests been granted. Corruption is a statutorily available basis for vacation. Fla.Stat.Ann. Section 682.13(1)(a),(b). Maryland Casualty contends there existed a possibility that members of the partnerships routinely appointed one another to arbitration panels without

disclosing their common financial interests, and that discovery was essential to surface this corruption.

[4,5] The district court properly denied Maryland Casualty's discovery request for two reasons. First, the purpose of discovery is to provide a mechanism for making relevant information available to the litigants. Fed.R.Civ.P. 26 advisory committee notes. The trial court reviewed the partnership documents in camera to determine if there was any information relevant to Maryland Casualty, because the district judge was of the opinion that the other investors, non-parties to this action, should not have their name and investments "spread around". There was no abuse of discretion in denying Maryland Casualty's discovery requests after making this in camera inspection. Commercial Union Ins. Co. v. Westrope, 730 F.2d 729, 731 (11th

Cir. 1984).

[6] Second, that arbitrators appoint each other to panels does not per se manifest "evident partiality or corruption." Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 701-02 (2d Cir. 1978). In any event, the terms "corruption, fraud, or other undue means," refers to activity that "is inherent in, or occurs during, the arbitration proceeding." American Fidelity Fire Ins. Co. v. Richardson, 189 So.2d 486, 489 (Fla.Dist.Ct.App. 1966); cert. denied, 200 So.2d 814 (Fla. 1967) (interpreting predecessor to Section 682.13(1)(a)). The meaning of "corruption" in subsection (b) should likewise be interpreted to refer to corruption germane to the arbitration proceeding. The purpose for which Maryland Casualty now claims it sought the discovery was to investigate dealings the arbitrators had

with non-parties. It could not be used to establish corruption within the arbitration proceeding.

The award of attorney's fees was proper. The district court stated that:

> Counsel for Plaintiff reasonably expended 73 hours in prosecuting the Motion to Confirm the Arbitration Award. The witness for each party testified that a lodestar multiplier of 1.5 was appropriate, and I so find. A fee of $200.00 per hour is reasonable, taking into account all of the appropriate factors.

These findings satisfy Kreager v. Solomon & Flanagan, P.A., 775 F.2d 1541 (11th Cir. 1985).

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-866-CIV-RYSKAMP

RICARDO LOZANO,

Plaintiff,

vs.

MARYLAND CASUALTY COMPANY,

Defendant/Counter Petitioner,
Third-Party Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY,

Third Party Defendant.
_____/

Filed Dec. 5, 1986

FINAL ORDER CONFIRMING ARBITRATION AWARD

THIS MATTER commenced in the state court with the filing of a motion to confirm arbitration award pursuant to section 682.10, Fla. Stat. The defendant removed this matter under 28 U.S.C., Section 1441, alleging diversity of citizenship pursuant to 28 U.S.C. Section 1332. Maryland filed an answer affirmatively alleging misconduct on the part of two of the three arbitrators who heard the cause. The defendant seeks to

prohibit confirmation of the arbitration award citing Section 682.13(1)(a) and (b), Fla. Stat. Defendant has also filed a counterclaim for declaratory relief which seeks a similar determination. Both plaintiff and defendant have moved for summary judgment conceding that all facts necessary to a determination of this case are before the court and that there are no genuine issues of material fact.

The plaintiff was injured on May 28, 1983 while a passenger in a vehicle operated by Julio Ortiz, Jr. The plaintiff made a demand for uninsured motorist benefits against the defendant as insurer of the Ortiz vehicle. Pursuant to the terms and conditions of the defendant's policy of insurance, the plaintiff selected Donald J. Post as his arbitrator and the defendant selected David Rosner. On October 10, 1984 Post wrote to Rosner suggesting three names for consideration as

a possible neutral arbitrator. On October 16, 1984 Rosner replied to Post by rejecting the three names suggested by Post. Rosner submitted three names of his own, one of which was Kubicki. On October 22, 1984, Post responded by stating that Kubicki was acceptable provided he was not either representing the defendant or planning to do so. Thereafter, the matter proceeded to a final hearing which resulted in an award on March 11, 1986 for the plaintiff in the amount of $850,00.00. This award was agreed to by all three arbitrators.

The defendant has refused to honor this award thus compelling the plaintiff to bring the present action to confirm the arbitration award. Maryland made the following charges against the arbitrators in is counterclaim for declaratory relief:

9. Unknown and not disclosed to MARYLAND, from the date of the

appointment of the Respondent's arbitrator and neutral arbitrator was the fact that there existed a shared financial interest in a real estate partnership with a Mr. William Alper. The existence of this financial relationship was not disclosed by the Respondent's arbitrator and neutral arbitrator to the Petitioner herein or its counsel, in clear violation of Fla. Stat. Section 682.13(1)(a)(b). Had this financial interest, which has been continuing from the date of their appointments through and including the date of this arbitration award, been disclosed to Petitioner or its counsel, then Petitioner would have never consented to the selection of the neutral arbitrator, and would have inhibited the selection of the Respondent's

arbitrator. The arbitrators entered an award on March 11, 1986, and thereafter, the Respondent, RICARDO LOZANO, instituted an action in the Circuit Court of Dade County on March 125, 1986, to confirm the arbitration award, and served the Petitioner, MARYLAND, On April 3, 1986. See Exhibits 2, 3, and 4.

10. The failure of the arbitrators to disclose the above continuing financial relationship with each other, is a direct violation of Fla. Stat. Section 682.13(1)(a)(b), and resulted in an award based upon evident partially, which requires that this Court, upon the taking of testimony and the receipt of evidence, vacate the arbitration award of March 11, 1986, and to require a trial de novo, pursuant to the terms and conditions

of the policy of insurance issued by the Petitioner herein, to CARLOS LOZANO, and to which the Respondent, RICARDO LOZANO, seeks uninsured motorist benefits.

11. As further evidence of evident partially by the arbitrators in their deliberations, Respondent/ Plaintiff's arbitrator and the neutral arbitrator, consistently withheld form Petitioner the disclosure of their financial interest with each there and with other, and also, despite written demand by the Petitioner that they enter an award in compliance with the requirements of the Supreme Court of Florida, as set forth in its decision of Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984) answering special interrogatories as to the

defense of comparative negligence raised by the Petitioner herein, said arbitrators deliberately refused to enter such an award with special interrogatories, so as to permit the calculation of the amount and percentage of comparative negligence attributive to the actions of the Respondent herein, by his admitted failure to use an available and operational seatbelt, as well as while intoxicated. The actions of the Respondent/ Plaintiff's arbitrator and neutral arbitrator, in failing to disclose their financial relationships, prevented Petitioner from receiving a fair and impartial arbitration trial, and their actions of evident partiality, by their conduct in the preparation of the arbitration award, in failing to comply with

Florida law, require that the arbitration award of March 12, 1986 attached hereto as Exhibit 4, be vacated, and that new arbitrations be selected, and a new trial be granted to Petitioner to try this matter de novo.

The defendant has taken the depositions of Post and Kubicki. Post testified that he was a limited partner in a real estate venture wherein William Alper was the general partner and Duane Anderson, attorney for the plaintiff was also a limited partner. Alper, Anderson and Post had all been partners in the practice of law for some years. Alper left the partnership in 1975 and Post left in 1977. The facts of the legal partnership of Alper, Anderson and Post was common knowledge in the legal community while, of course, knowledge of the limited

partnership was not.

Post was also involved in two other real estate limited partnerships, one in which William Alper and his son Jon were general partners and seven others which were limited partners, including Donald Post and Gene Kubicki and one in which William Alper was general partner and Donald Post and Duane Anderson were limited partners. Based upon the foregoing facts, the defendant alleges that "evident partiality" within the meaning of Section 682.13(1)(a) and (b), Fla. Stat. exists and that the arbitration award should be set aside.

Since this matter is before this court on a claim of diversity of citizenship, this court is Erie-bound to apply the law of Florida in resolving the legal issues. It is clear that in Florida an arbitrator appointed by a party need not be impartial See Lee v. Marcus, 396 So.2d

208 (Fla. 3d DCA 1981). Thus, the issue is narrowed to the question of whether the limited partnerships in which the designated arbitrator and the neutral arbitrator were both limited partners creates "evident partiality" within the meaning of the statute.

The court has found no precedent for establishing "evident partiality" based upon the fact that two out of the three arbitrators had a business relationship. In every case the court examined there was an allegation of a relationship between the arbitrator (either single or neutral) and one of the parties to the dispute. See e.g. Middlesex Mutual Insurance Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982); Commonwealth Coatings Corporation v. Continental Casualty Company, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed 2d 301 (1968).

The record herein indicates that Post and Kubicki had each invested in a real

estate transaction which was controlled by a third party. Their only obligation was to furnish money in accordance with the terms of the limited partnership agreement. There was nothing that one could do to curry favor with the other. Except for the size of the transaction and the number of investors, this is no different than two individuals buying the same issue of the corporate stock or investing in the same mutual fund. The court finds nothing in this relationship which would be the basis for a disclosure by either Post or Kubicki. Nor is the fact that William Alper was the general partner a significant fact. Alper was once a partner with Anderson and Post but this relationship terminated some eleven years before the award. The defendant's claim to set aside the award based upon the facts appearing in this record are so attenuated that it forms no basis for relief under Section 682.13, Fla.

Stat. The court has carefully examined the record in this cause to determine if there is any evidence of partiality or improper conduct and has found none.

In light of this court's findings, it is not necessary to deal with the defendant's contentions that special interrogatories were required to determine the plaintiff's degree of negligence in failing to use an operational seatbelt. The defendant has cited no authority to the court that the rule in Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984), is binding upon an arbitration proceeding conducted under Chapter 682, Fla. Stat.

Accordingly, it is,

ORDERED and ADJUDGED as follows:

1. The plaintiff's motion for summary judgment is hereby GRANTED. The motion to confirm the arbitration award of March 11, 1986 is GRANTED.

2. The defendant's motion for summary judgment is hereby DENIED.

3. The plaintiff's request for attorneys' fees deferred until the plaintiff can establish a basis in law for the award of attorneys' fees.

4. Costs are awarded to the plaintiff.

DONE and ORDERED at the United States District Court, Miami, Dade County, Florida this 5th day of December, 1986.

Sn/ Kenneth L. Ryskamp
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-5037 & 87-5228

Filed Nov - 9 1988

RICARDO LOZANO,
Plaintiff-Appellee,

versus

MARYLAND CASUALTY COMPANY,
A Foreign Corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND

SUGGESTION(S) OF REHEARING IN BANC

(Opinion August 1, 1988, 11 Cir., 1988, ____F.2d____).

(November 9, 1988)

Before Roney, Chief Judge, KRAVITCH, Circuit Judge and Henderson, Senior Circuit Judge.

PER CURIAM.

(/) The Petition(s) for Rehearing are DENIED and no member of this panel nor

other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

Sn/ Paul H. Roney
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-5037 & 87-5228

Filed Nov 18 1988

RICARDO LOZANO,
Plaintiff/Appellee,

versus

MARYLAND CASUALTY COMPANY,
A Foreign Corporation,
Defendant/Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ORDER:

(/) The motion of appellant for (XX) stay

( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including January 1, 1989, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition

has been filed. The Clerk shall issue the mandate upon the filing of copy of an order of the Supreme court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

Sn/ Paul H. Roney
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

November 18, 1988

James F. Dougherty II
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Miami Beach, FL 33139

Richard A. Sherman
Suite 102
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Ft. Lauderdale, FL
33301

No. 87-5037 & 87-5228
Ricardo Lozano -v-
Maryland Casualty
86-866-CIV-KLR - Dist. Ct. No.

MANDATE STAYED TO AND INCLUDING January 1, 1989

The court has this day granted a stay of the mandate to the date shown above. If during the period of the stay there is filed in this court a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme

Court denying the petition for writ of certiorari, the mandate shall issue forthwith. See Fed.R.App.P. 41.

The Clerk of the Supreme Court has requested the clerks of the federal courts of appeal to retain the record on appeal until the Supreme Court requests that it be transmitted. Parties will be advised when this occurs. Accordingly, please refrain from routinely requesting transmittal of the record. See Supreme Court Rule 19.1.

A copy of this court's opinion (or Rule 36-1 decision), the judgment, and any order on rehearing should be attached as an appendix to any petition for writ of certiorari (or jurisdictional statement) filed. See Supreme Court Rules 21(k), 15(j).

( ) This court has also directed recall of the mandate. By copy of

this letter the clerk of the district court is requested to return the opinion and judgment previously issued as mandate.

Sincerely,

MIGUEL J. CORTEZ, Clerk

By: Sn/Irene Hendrix
Deputy Clerk

cc: Mark Hicks
Don Russo